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Returning From War

Rights of military personnel upon re-employment in the civilian sector

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In this time of war and military action, many men and women are called upon to leave their civilian employment and serve their country as members of the United States Armed Forces. As military personnel begin to return from service, their attempts to settle back into their civilian jobs may be challenging to both the employees and employers.

Over the next few years, employers will face the increasing demands and challenges imposed upon them under New Jersey and federal law, which require employers to treat returning servicemen and women fairly. Employers need to be aware of the current regulations concerning the rights of military personnel to ensure that their employment practices are in accordance with the law.

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301-4334 (USERRA), is the leading statute enacted by Congress to protect the rights of men and women who voluntarily or involuntarily leave their employment positions to perform military service. USERRA prohibits an employer from discriminating against past or present members of the armed services. An employer cannot deny someone employment, reemployment, promotion or any benefit of employment based on that person's status as a member, or applicant to become a member, of the armed services.

Employers may believe they have legitimate reasons for disfavoring employees with military status. When employees are sent off to serve their country, employers are under an obligation to continue to provide employees with nonseniority benefits, such as health benefits. Not only are employers losing members of their workforces, but they are obligated to continue paying such employees if they seek to use vacation or annual paid leave to cover their time in the service. While employees with military status are often not preferred by employers, USERRA and other such laws prevent adverse action from being taken against service members with civilian jobs. First, employers cannot deny employment to a prospective employee on the basis of that person's membership or prospective membership in the armed forces. 38 U.S.C. § 4311; 20 C.F.R. § 1002.40. While the employer may ask about an employee's military status during the hiring process, the employer may not refuse to hire the applicant based on his military status. Id.

Once a service member has been hired, employers should be aware of their obligations should the service member's employment be interrupted by military leave. Employers are required to reinstate returning service members within two weeks after they apply for re-employment unless certain unusual circumstances exist. 38 U.S.C. 4312; 20 C.F.R. 1002.181. This requirement is strict, and the Department of Labor will uphold the employer's responsibility even if there is no comparable position open or if there is a hiring freeze in effect at the time of the service member's return. 38 U.S.C. § 4313; *Rogers v. Department of Army*, 88 M.S.P.R. 610 (2001). Employers must be prepared to re-employ a service member to a position with the same seniority, status and pay they would have received had they not departed for military service. 38 U.S.C. 4313(a)(2)(A), (B). Under USERRA, an employer is required to provide such re-employment to a service member for up to five years while the employee is performing his military service. 20 CFR § 1002.99.

USERRA mandates that an employer cannot deny a military employee a "benefit of employment." Employers should note that USERRA's protections reach beyond initial employment, and are broad with regard to continued employment. For example, an employer may not refuse to allow veterans to take a make-up promotional exam when they missed the original exam while out on military leave. *Fink v. City of New York*, 129 F.Supp.2d 511 (E.D.N.Y. 2001). An employer may not transfer the employee to a job with a less-regular working schedule and longer work days. *Hill v. Michelin North America, Inc.*, 252 F.3d 307 (S.C. 2001). Nor may an employer classify military leave as an "absence" to circumvent overtime pay, bonus pay, "perfect attendance" leave and upgrading opportunities. *Rogers v. City of San Antonio, Texas*, 211 F.Supp.2d 829 (W.D. Tex. 2002).

USERRA imposes many obligations on employers, and because of its sweeping language, has made it relatively easy for employees to claim discrimination.

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Congress recently enacted federal regulations, published by the Department of Labor, to clarify the rights and responsibilities of employees and employers under USERRA, and employers would do well to review and implement the requirements of the newly enacted regulations. 20 C.F.R. § 1002.1-1002.314.

To establish a case of discrimination under USERRA, an employee does not need to show that his status as a member of the armed forces was the sole reason or cause of adverse employment action. 38 U.S.C. § 4311(c)(1). Instead, an employee need only show that the employee's membership, application for membership, performance of service, application for service or obligation for service in the uniformed services was a "motivating factor" in the employer's actions or conduct. Id. Courts have interpreted this provision broadly, and have determined that an employee's military status is a motivating factor if the employer "relied on, took into account, considered, or condition its decision" on such status. *Fink*, 129 F. Supp. 2d at 520, citing *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F. Supp. 571 (E.D. Tex. 1997). Thus, employers need to be sure that any adverse employment action taken against a returning service member is well-documented and taken for reasons other than the employee's military status.

USERRA does provide employers with some protection. Employees returning from military service are required to provide notice to their employers prior to their return. 38 U.S.C. § 4312(e). The notification periods vary depending on the employee's military service time. 38 U.S.C. § 4312(e)(1)(A)-(D); 20 CFR § 1002.115. Employers also are not required to reinstate a service member to a civilian position that he is not qualified to perform. 20 CFR § 1002.198. While the employer does have an affirmative duty to assist the returning employee in acquiring requisite skills, if the employee does not have the "ability to perform the essential tasks of the position," the employer does not have to reinstate them to that position. 38 U.S.C. § 4303(9).

Federal law not only protects service members' employment, but also alleviates service members' financial and legal obligations. The Soldier's and Sailor's Relief Act, 50 U.S.C. § 501 et seq. (SSRA), can provide service members with protection from eviction (for rent of $1,200 or less), delay of all civil court actions, including bankruptcies and foreclosures, and reduced interest rates on mortgage payments and credit card debt. The SSRA has been replaced by the more expansive Service Member's Civil Relief Act (SMCRA), which provides the same protections as the SSRA but includes additional protections for service members' motor-vehicle leases, and increases the eviction protection for rent up to $2,465.

In addition to federal law, employers need to be aware of state anti-discrimination laws that protect military service personnel. The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (NJLAD), provides protection to military personnel and prohibits practices of discrimination based on one's service in the United States Armed Forces. N.J.S.A. 10:5-3. The burden on the employees to show discrimination under the NJLAD is slightly more stringent than under USERRA. To prove an adverse employment action, the employee bears the burden of showing that he was a member of the Armed Forces, was qualified for the position, but was not hired or was terminated and replaced by someone similarly qualified. *Viscik v. Fowler Equipment Co.*, 173 N.J. 1 (2002). The burden then shifts to the employer to provide a nondiscriminatory reason for its actions. If met, the burden shifts back to the employee to show that the employer's reason was only a pretext for discrimination. *Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999).

New Jersey law also provides financial protection to military personnel. Under the New Jersey Soldiers' and Sailors' Civil Relief Act of 1979, N.J.S.A. 38:23C-1 et seq. (NJSSRA), service personnel are entitled to deferment of tax and contractual obligations, stays of proceedings such as evictions, and other relief, including 30 days paid leave. In addition, for several years running, New Jersey's governors have issued executive orders entitling state employees to extended paid leave in the form of the differential between their state salary and military pay for 90 days. Some municipalities have also enacted similar ordinances for the benefit of local government employees. Even private employers have followed suit, notably Sears, which has extended medical, dental, and life insurance benefits, as well as paid leave up to 24 months.

More and more, our reservists and National Guard servicemen and women are being called into active duty. If current events in the Middle East are any indication, this trend will not soon subside. Employers must concede that they, too, will be affected by United States' military actions abroad, and must stay abreast of statutes, regulations and evolving case law governing treatment of returning service personnel. Compliance with the mandates of federal and state legislation, regulations, executive orders and local ordinances will assist employers in avoiding disputes and litigation, and ensure that our military personnel are treated fairly upon their return service abroad. ■